

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

**TINLEY PARK HOTEL AND  
CONVENTION CENTER, LLC**

**and**

**Case 13-CA-141609**

**AUDELIA SANTIAGO, an Individual**

**GENERAL COUNSEL’S LIMITED EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE’S DECISION AND  
ARGUMENTS IN SUPPORT OF THE EXCEPTIONS**

On June 16, 2015, Administrative Law Judge Charles J. Muhl issued his decision finding that Tinley Park Hotel and Convention Center, LLC, violated Section 8(a)(1) of the Act by promulgating and maintaining four overly broad rules.<sup>1</sup> The ALJ also found that Respondent violated Section 8(a)(1) of the Act when it discharged Audelia Santiago for violating its overly broad and unlawful rule prohibiting disloyalty. However, the ALJ failed to provide a complete remedy for the overbroad rules promulgated by Respondent. Further, the ALJ failed to award search for work expenses as part of a make-whole remedy for Respondent’s unlawful discharge of Santiago, as urged by the General Counsel.

Although the ALJ acknowledged Respondent’s obligation to rescind the unlawful rules from Respondent’s Personal Conduct and Work Rules policy, (ALJD, p. 12, lines 29-30) the ALJ did not require the inclusion of the affirmative provision that spells out various options for accomplishing the proper rescission remedy that the Board has required in recent decisions such

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<sup>1</sup> In this Brief, the Administrative Law Judge will be referred to as “the ALJ”; the National Labor Relations Board will be referred to as the “Board”; and Tinley Park Hotel and Convention Center, LLC will be referred to as “Respondent”. Citations to the ALJ’s decision will be referred to as “ALJD” followed by the page and line numbers specifically referenced.

as *Purple Communications*, 361 NLRB No. 43, slip op. at 6 (2014). Additionally, although the ALJ properly ordered backpay (ALJD, p. 11, lines 15-32) the ALJ failed to reimburse Santiago for search-for-work and work-related expenses (ALJD, p. 11, footnote 12). Well established and recognized public policy supports the Board's incorporation of search for work expenses into its panoply of standard make-whole remedies.

Accordingly, pursuant to Section 102.46 of the Board's Rules and Regulations, the General Counsel respectfully files the following limited exceptions to the ALJD and offers the arguments below in support thereof:

### **Exceptions**

**Exception 1:** The ALJ's failure at ALJD p. 12, line 27 – p. 13 line 25 and in the ALJD Appendix, to include an affirmative provision in the Order, and a corresponding provision in the Notice to Employees, requiring Respondent to provide the complete remedy for the unlawful rules in its employee handbook, pursuant to *Purple Communications*.

**Exception 2:** The ALJ's failure at ALJD p. 11, footnote 12 to order reimbursement for discriminatee Audelia Santiago's search-for-work and work related expenses as part of the make-whole remedy for Respondent's discriminatory discharge of Santiago.

### **Argument in Support of Exceptions**

#### **I. The Board Should Require Respondent to Furnish Employees with an Insert for the Current Employee Handbook or Furnish Employees with a New Employee Handbook, Thereby Adhering to the Alternatives Outlined in *Purple Communications* (Exception 1)**

The ALJ failed at ALJD p. 12, line 27 – p. 13 line 25, to order Respondent to furnish employees with an insert for the current employee handbook or furnish employees with a new employee handbook that adheres to the alternatives outlined in *Purple Communications*, above. Specifically, when an employer maintains an unlawful rule, the Board has required the employer to “[f]urnish employees with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on

adhesive backing that will cover the unlawful provision; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision[.]” *Purple Communications*, above. Here, the ALJ failed to grant this specific remedy. (ALJD p. 12, line 27 – p. 13 line 25).

The ALJ noted that Respondent failed “to meet the requirements of a proper rule rescission as established in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978).” (ALJD p. 10, footnote 11). As a result of this failure, the ALJ included an affirmative action requiring Respondent to rescind its unlawful rules. (ALJD p. 12, lines 27-30). However, inclusion of this provision does not result in the exclusion of the additional affirmative provision established in *Purple Communications*. The decision in *Purple Communications* goes beyond the requirement to rescind rules. *Purple Communications* imposes the additional requirement to furnish employees with an insert or new handbook explaining that the rule has been rescinded or providing the new lawfully worded provision. *Purple Communications*, above. Given this important distinction, the requirement established in *Purple Communications* is still necessary to fully remedy the violations found by the ALJ in this case. Accordingly, the Board should include an affirmative provision in the Order and in the Notice to Employees requiring Respondent to include the excerpt from *Purple Communications* above.

## **II. The Board Should Award Search-For-Work and Work Related Expenses Regardless of Whether These Amounts Exceed Interim Earnings (Exception 2)**

The General Counsel respectfully submits that the ALJ erred when he failed to order reimbursement of discriminatee Audelia Santiago’s search-for-work expenses as part of the make-whole remedy. (ALJD p. 11, footnote 12). For the reasons that follow, Respondent should be ordered to reimburse Audelia Santiago for expenses incurred while seeking interim employment.

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment<sup>2</sup>; the cost of tools or uniforms required by an interim employer<sup>3</sup>; room and board when seeking employment and/or working away from home<sup>4</sup>; contractually required union dues and/or initiation fees, if not previously required while working for respondent<sup>5</sup>; and/or the cost of moving if required to assume interim employment.<sup>6</sup>

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatee's gross interim earnings. See *West Texas Utilities Co.*, 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent"); see also *North Slope Mech.*, 286 NLRB 633, 641 n.19 (1987).

Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time

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<sup>2</sup> *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

<sup>3</sup> *Cibao Meat Prods.*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).

<sup>4</sup> *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

<sup>5</sup> *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

<sup>6</sup> *Coronet Foods, Inc.*, 322 NLRB 837, 837 (1997).

such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work<sup>7</sup>, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.*, 356 NLRB No. 8, slip op. at 3 (2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *Pressroom Cleaners & Serv. Employees Int 7 Union, Local 32BJ*, 361 NLRB No. 57, slip op. at 2 (2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct.

Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions-i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at \*5, available at 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia*

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<sup>7</sup> *Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

*Power Co.*, 2001 WL 168898 at \*29 (Feb. 2001), *aff'd Georgia Power Co. v. US. Dep't Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses are clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." *Don Chavas, LLC*, 361 NLRB No. 10, slip op. at 3 (2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.<sup>8</sup> These expenses should be calculated separately from taxable net back pay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. See *Jackson Hospital Corp.*, 356 NLRB No. 8, slip op. at 1 (2010) (interest is to be compounded daily in back pay cases).

### **Conclusion**

For the foregoing reasons, the General Counsel respectfully requests that the Board find merit to the General Counsel's Limited Exceptions, but otherwise affirm the ALJ's rulings, findings, and conclusions.

Dated at Chicago, Illinois this 14th day of July, 2015.

Respectfully Submitted,

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<sup>8</sup> Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 (1953).

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